Supreme Court, U.S.
FILED
JUL 14
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5454

In The

Supreme Court of the United States

October Term 1986

DAVID RANDOLPH GRAY,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER BY THE NORTH CAROLINA ATTORNEY GENERAL AND THE 12 AMICI THAT APPEAR ON THE INSIDE COVER

Lacy H. Thornburg
Attorney General

Joan H. Byers
Special Deputy Attorney General

David Roy Blackwell
Assistant Attorney General
Counsel of Record
P. O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-6012

Alabama by Charles A. Graddick, Attorney General
California by John Van de Kamp, Attorney General
Connecticut by John I. Kelly, Chief State's Attorney
Delaware by Charles M. Oberly, III, Attorney General
Florida by Jim Smith, Attorney General
Illinois by Neil F. Hartigan, Attorney General
Indiana by Linley E. Pearson, Attorney General
Louisiana by William J. Guste, Jr., Attorney General
South Carolina by T. Travis Medlock, Attorney General
South Dakota by Mark V. Meierhenry, Attorney General
Virginia by Mary Sue Terry, Attorney General
Wyoming by A. G. McClintock, Attorney General

QUESTION PRESENTED FOR REVIEW

MAY THE ERRONEOUS EXCLUSION OF A JUROR FROM THE PANEL IN A CAPITAL MURDER TRIAL ON THE BASIS OF *WITHERSPOON v. ILLINOIS* BE HARMLESS ERROR?

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No. 85-545

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Respondent.

BRIEF AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The ***amici curiae*** here consist of States, each of which maintain capital punishment for certain murders. The States, by statute or case decision, utilize jury selection procedures allowing the exclusion of veniremen consistent with this Court's decisions in ***Wainwright v. Witt***, __ U.S. __ , 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), ***Adams v. Texas***, 440 U.S. 33 (1980), and ***Witherspoon v. Illinois***, 391 U.S. 510 (1968).

Petitioner in this matter asserts that the Mississippi trial court violated his right to a jury that was fair and impartial, based upon the Sixth Amendment guarantee, when the trial judge excused a venireman plainly qualified to serve on a capital jury, based upon ***Witherspoon v. Illinois, supra***. The Defendant completed jury selection with peremptory challenges remaining. The State exhausted its peremptory challenges due to the trial judge's erroneous refusal, earlier in jury selection, to exclude some jurors on ***Witherspoon*** grounds. The State utilized peremptory challenges to remove these jurors following denial of the challenge for cause. The Supreme Court of Mississippi held the erroneous exclusion constituted harmless error. Petitioner asserts on the authority of ***Davis v. Georgia***, 429 U.S. 122 (1976), that such error may never be harmless. The States, by statute or case decision, recognize the harmless error doctrine in other contexts, and discern no reason harmless error should not apply in a capital case jury selection proceeding involving ***Witherspoon*** issues.

STATEMENT OF THE CASE

The States adopt the Statement of the Case as set forth by the respondent State of Mississippi.

SUMMARY OF THE ARGUMENT

The States recognize the special position which a capital jury occupies in most state capital punishment procedures, and the particularly close scrutiny capital trials must withstand. However, the States also believe that the fact that a defendant has been sentenced to death does not preclude a reviewing court from employing the harmless error rule in determining the effect of a ***Witherspoon*** error in jury selection.

The majority of the States require a defendant in a noncapital felony trial to prove actual prejudice by the improper exclusion or inclusion of a venireman. These States thus apply the harmless error doctrine in appropriate instances.

This court has applied the harmless error doctrine to most constitutional errors in felony proceedings including proceedings in which the defendant has received the death penalty. The nature of ***Witherspoon*** error and the applicable constitutional provisions fall within the harmless error guidelines applied by this Court in other cases. The States urge this Court to recognize the harmless error doctrine in dealing with ***Witherspoon*** error, and specifically urge this Court to reject the per se reversible error approach to ***Witherspoon*** excludables suggested by the ***per curiam*** opinion in ***Davis v. Georgia***, 429 U.S. 122 (1976).

ARGUMENT

THE MAJORITY OF STATES REQUIRE A DEFENDANT TO SHOW PREJUDICE RESULTED FROM THE TRIAL COURT'S ERRONEOUS GRANT OR DENIAL OF A CHALLENGE FOR CAUSE MADE IN THE COURSE OF A FELONY JURY TRIAL. NEITHER THE CONSTITUTION NOR THE SPECIAL DUTIES AND RESPONSIBILITIES OF A CAPITAL JURY JUSTIFIES THE REJECTION OF THE HARMLESS ERROR DOCTRINE IN *WITHERSPOON* ISSUES.

The States recognize the position which a capital jury occupies in most state capital punishment procedures. The States further recognize the particular sensitivity required of both the trial and appellate bench to discern and avoid possible juror bias or prejudice. ***Turner v. Murray***, 476 U.S. __ , 106 S.Ct. 1683, 90 L.Ed.2d 27, 30, 1986). The qualitative difference of death from all other punishments requires a correspondingly greater scrutiny of the capital sentencing determination for circumstances which create an unacceptable risk that the jurors mistakenly or arbitrarily imposed a death penalty. ***Turner v. Murray***, 90 L.Ed.2d at 36. However, nothing in the nature of the jury role in capital trial and sentencing proceedings nor in the United States Constitution itself dictates that a court must hold automatically prejudicial ***Witherspoon*** error in the jury selection proceeding. In a capital case, as in a non capital case, the ultimate concern is that the jury which tries the defendant be impartial. The application of the harmless

error doctrine to ***Witherspoon*** error by a reviewing court does not in any way jeopardize that goal.

Numerous State courts have considered the improper grant or denial of a challenge for cause as reversible or harmless error. Most States, by statute, court rule, or case decision, require a defendant seeking reversal of his conviction or vacation of his sentence based upon the erroneous grant or denial of a challenge to a venireman to demonstrate some prejudice to the defense by the trial court's erroneous action. Proof of prejudice may require the exhaustion of all peremptory challenges before completion of jury selection or, in addition to exhaustion of all challenges, may require the attempted challenge of an additional juror following exhaustion of all peremptory challenges and the denial of a challenge for cause.

For example, The North Carolina Criminal Procedure Act sets forth, with specificity, the steps necessary to preserve for appellate review error in the denial of a defendant's challenge for cause. N.C.G.S. 15A-1214(h) (1983) requires that the defendant exhaust all the peremptory challenges available to him, renew a challenge for cause previously denied, and allow the trial court to again deny the challenge. Interestingly, the North Carolina practice allows the trial judge to grant additional peremptory challenges to any party who the trial court determines suffered wrongful denial of a challenge for cause and utilized a peremptory challenge in lieu thereof. See N.C.G.S. 15A-1214(i) (1983). Case law imposes similar requirements upon a defendant asserting error in the trial court's grant of a state's challenge for cause. See ***State v. Potts***, 100 N.C. 457, 6 S.E. 657 (1888).

As an additional example, the New York Criminal Practice Law (CPL § 270.20) codifies the requirements a defendant must meet to assert on appeal prejudicial error for the erroneous grant or denial of a challenge for cause. In the case of the erroneous grant of a State's challenge for cause, the statute requires a showing that the State exhausted all peremptory challenges at the time or exhausted such challenges before completion of jury selection. The erroneous denial of a defense challenge for cause constitutes reversible error only when the defendant exhausted his peremptory challenges prior to the denied challenge for cause, or the defendant peremptorily challenged the juror and exhausted his peremptory challenges prior to completion of jury selection. See ***People v. Culhane***, 33 N.Y.2d 90, 350 N.Y. Supp. 2d 381, 305 N.E.2d 469, 71 ALR 3d 956 (1973), and ***People v. Murphy***, 99 A.D.2d 613, 472 N.Y. Supp. 2d 202 (1984). Absent compliance with the statute, error in the grant or denial of a challenge for cause stands harmless.

Cases from other jurisdictions also require exhaustion of peremptory challenges as proof of prejudice.[1] Some jurisdictions

[1] ***Jenkins v. State of Florida***, 380 So. 2d 1042 (Fla. App., 1980), ***review denied*** 389 So.2d 111; ***Finney v. State***, 242 Ga. 582, 250 S.E. 2d 388 (1978) ***cert. denied*** 441 U.S. 916 (1979); ***State v. Mitchell***, 104 Id. 493, 660 P.2d 1336, ***cert. denied*** 461 U.S. 934 (1983); ***Foresta v. State***, 274 Ind. 658, 413 N.E. 2d 889 (1980); ***State v. Sagebiel***, 206 Kan. 482, 480 P.2d 44 (1971); ***State v. Smith***, 430 So. 2d 31 (La. 1983); ***State v. Pellatier***, 434 A.2d 52 (Me. 1981); ***Com. v. Susi***, 394 Mass. 784, 477 N.E.2d 995 (1985); ***People v. Rush***, 113 Mich. 539, 71 N.W. 863 (1897); ***Kennison v. State***, 83 Neb. 391, 119 N.W. 768 (1909); ***State v. Fouquette***, 67 Nev. 505, 221 P.2d 404 (1950); ***State v. Smith***, 92 N.M. 533, 591 P.2d 664 (1979); ***State v O'Connor***, 58 N.D. 554, 226 N.W. 601 (1929); ***Hartnett v. State***, 42 O.S. 568 (1884); ***AKE v State***, 663 P.2d 1 (Okla. 1983) ***on rev.*** 465 U.S. 1099, 105 S.Ct. 1087, 84 L.Ed.2d 53 (NO. 83-5424 dec. February 26, 1985); ***State v. Humphrey***, 63 Or. 540, 128 P. 824 (1912); ***Com. v. Johnson***, 299 Pa. Super. 172, 445 A.2d 509 (1982); ***State v. Flack***, 77 S.D. 176, 89 N.W. 2d 30 (1958); ***Hammett v. State***, 578 S.W. 2d 699 (Tex.

continued

require exhaustion of all peremptory challenges and the attempted exercise of an additional peremptory challenge following denial of a challenge for cause. In essence, these jurisdictions require the defendant to accept an unqualified or unwanted juror for a showing of prejudice.[2] A few jurisdictions reject the harmless error approach and hold as prejudicial any improper grant or denial of a challenge for cause.[3] Finally, some cases consider the rejection of a qualified juror harmless error absent some showing that the jury, as constituted, was not fair and impartial.[4]

Thus, the majority of the states require some showing of prejudice in the erroneous grant or denial of a challenge for cause prior to awarding a complaining defendant a new trial. Relatively few jurisdictions adopt a per se error rule. There is no constitutional reason to alter these traditional rules requiring a showing of prejudice simply because the improper challenge involved a ***Witherspoon*** violation as opposed to a challenge based on some other ground.

continued from above

Cr. App. 1979) pet. dis. 448 U.S. 725; ***State v. Hewitt***, 689 P.2d 22 (Utah, 1984); ***Masterson v. State***, 139 Vt. 106, 423 A.2d 845 (1980).

[2] ***People v. Washington***, 104 Ill.App. 3d 386, 432 N.E.2d 1020 (1982); ***State v. Cody***, 446 So.2d 1278 (App. 2d Cir., 1984); ***State v. Adcock***, 310 N.C. 1, 310 S.E.2d 587 (1983).

[3] ***State v. McGrew***, 534 S.W. 2d 549 (Mo. App., 1976) and ***State v. Daniels***, 629 S.W. 2d 627 (Mo. App., 1982); ***Breeden v. The Com.***, 217 Va. 297, 227 S.E.2d 734 (1976); ***State v. West***, 157 W.Va. 209, 200 S.E.2d 859 (1973).

[4] ***State v. Kendall***,200 Iowa 483, 203 N.W. 806 (1925); ***Gall v. Com.***, 607 S.W.2d 97 (Ky, 1980), ***ovrd on other grounds Payne v. Com***, 623 S.W.2d 867 (Ky.1981); ***State v. Kluseman***, 53 Minn 541, 55 N.W. 741 (1893); ***State v. Austad***, 197 Mon.70, 641 P.2d 1373 (1982); and ***State v. Sinclair***, 57 N.J. 56, 269 A.2d 161 (1970).

In ***Witherspoon v. Illinois***, 391 U.S. 510 (1968), this Court held constitutionally impermissible the removal from the venire of all persons who expressed conscientious scruples in opposition to capital punishment. Justice Stewart wrote that such a jury, swept of all who expressed reservations concerning the imposition of a death sentence, fell short of the Sixth Amendment requirement of a fair and impartial jury in its role as an arbiter of the punishment to be imposed. ***Witherspoon v. Illinois***, 391 U.S. at 518. Justice Stewart noted that a capital jury expresses the conscience of the community on the ultimate question of life or death, a capital defendant stands constitutionally entitled to a jury chosen from a venire reflecting the community views on sentencing issues.

However, nothing in Justice Stewart's opinion suggests a per se error rule is applicable to the improper exclusion of a single venireman, as opposed to a distinctive group, on ***Witherspoon*** grounds. Subsequently, in ***Davis v. Georgia***, 429 U.S. 122 (1976), this Court, ***per curiam***, reversed a death sentence based upon the improper ***Witherspoon*** exclusion of a single venireman. In dissent, Justice Rehnquist (joined by Chief Justice Burger and Justice Blackmun) observed that "[i]t is, moreover, unclear whether the State was entitled to another peremptory challenge, and surely [***Witherspoon v. Illinois***, 391 U.S. 510 (1968)] does not decide whether the presence of unexercised peremptory challenges might render harmless the improper exclusion of a limited number of veniremen." ***Davis v. Georgia, Illinois***, 429 U.S. at 124. Therefore, ***Davis v. Georgia, supra***, did not invalidate in the ***Witherspoon*** context, the rule of the majority of the States that requires exhaustion of all peremptory challenges in order to show prejudice from the improper exclusion of a venireman, and left

open the question whether such an improper exclusion ever may constitute harmless error.

Moreover, nothing about the improper exclusion of a venireman on the basis of ***Witherspoon*** requires a rule of per se reversible error. In ***Lockhart v. McCree***, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), this Court held the removal of ***Witherspoon*** excludables from a capital felony murder venire contravened neither the Sixth Amendment fair cross section requirement nor the constitutional guarantee of a fair and impartial jury. Writing for the Court, Justice Rehnquist noted that the Sixth and Fourteenth Amendment fair cross section requirement, as applied to the States, imposed no requirement that the jury actually chosen reflect the composition of the community at large. ***Lockhart v. McCree***, 90 L.Ed.2d at 147-48. ***See also Batson v. Kentucky***, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d at 79 (Note 4) (1986). Justice Rehnquist acknowledged that the fair cross section requirement protects the criminal defendant's right to the common sense judgment of the community. ***Lockhart v. McCree***, 90 L.Ed.2d at 148. However, the Constitution requires no intellectual or political balancing in the selection of the actual jurors in a criminal trial. Justice Stewart's ***Witherspoon*** opinion similarly refers to the jury function as the conscience of the community in determining the capital defendant's sentence. As the ***Lockhart*** and ***Witherspoon*** opinions recognize, the fair cross section requirement applies to the jury venire from which the panel flows. No defendant stands entitled to a particular venireman serving as a juror on the defendant's jury.

In ***Lockhart***, the Court also discussed the claim that death qualification deprives the defendant of a constitutionally fair and

impartial jury. In rejecting this argument, this Court held that an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts. ***Lockhart v. McCree***, 90 L.Ed.2d at 154-55 (1986).

Thus, this Court's recent cases involving the fair cross section and fair and impartial jury guarantees recognize that even in a capital trial the venire from which the jurors are chosen only must represent a fair cross section of the community. A fair and impartial jury need not mirror the racial, educational, political, or socio-economic parameters of the community so long as the jury chosen may conscientiously apply the law and find the facts. ***Lockhart v. McCree, supra***; ***Witherspoon v. Illinois, supra***.

Nineteen years ago, this Court recognized that constitutional error could be harmless. ***Chapman v. California***, 386 U.S. 18 (1967). The record must reflect, however, and the reviewing court must determine beyond a reasonable doubt, that the alleged constitutional error did not contribute to the defendant's conviction. ***Chapman v. California***, 386 U.S. at 23-24.

This Court reaffirmed the harmless constitutional error doctrine in ***United States v. Hasting***, 461 U.S. 499 (1983). Writing for the majority, the Chief Justice reviewed the court's ***Chapman*** opinion. Chief Justice Burger noted that "[i]n holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error -free, perfect trial, and that the Constitution does not guarantee such a

trial." ***United States v. Hasting***, 461 U.S. at 508-9. (citations and footnotes omitted) The Chief Justice continued, noting that "[s]ince ***Chapman***, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations (citations omitted)." ***United States v. Hasting***, 461 U.S. at 509. Absent such an approach to errors of even a constitutional dimension, as the Court noted in ***Hastings***, our courts would become impregnable citadels of technicality, divorced from the real world and insulated from their responsibilities.

This Court has considered the applicability of the harmless constitutional error standard in a variety of contexts. ***See Rose v. Clark***, ___ U.S. ___, ___ U.S.L.W. ___ (July 2, 1986). Recently, this Court applied the harmless constitutional error analysis to a violation of the Sixth Amendment confrontation clause ***Delaware v. Van Arsdall***, 475 U.S.___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1985). See also ***Harrington v. California***, 395 U.S. 250 (1969) and ***Schneble v. Florida***, 405 U.S. 427 (1972). Although not specifically applying the doctrine of harmless error, this Court adopted a harmless constitutional error analysis to Fourth Amendment search and seizure issues in ***Nix v. Williams***, 467 U.S. 431 (1984)(inevitable discovery exception to the exclusionary rule). In ***Berkemer v. McCarty***, 468 U.S. 420 (1984) (custodial interrogation), this Court declined to apply the harmless error doctrine where the record appeared incomplete.

Likewise, ineffective assistance of counsel claims raised under the Sixth Amendment guarantee of effective assistance of counsel stand subject to harmless error analysis. ***Strickland v. Washington***, 466 U.S. 668 (1984). A defendant asserting constitutionally ineffec-

tive counsel must prove both counsel's constitutional ineffectiveness and resultant prejudice. The Court recognized that the Sixth Amendment does not guarantee a defendant perfect, error-free representation. ***Strickland v. Washington, supra***. Other Sixth Amendment cases applying the harmless error analysis include ***McKaskle v. Wiggins***, 465 U.S. 168 (1984), and ***Rushen v. Spain***, 464 U.S. 453 (1983).

A violation of a defendant's Fifth Amendment privilege against self-incrimination is also subject to the harmless constitutional error analysis in certain circumstances. For instance, ***Chapman v. California***, 386 U.S. 18 (1967) involved prosecutorial comment on the defendant's failure to testify. Subsequently, the Court reaffirmed the harmless error concept as applied to Fifth Amendment violations of this nature in ***United States v. Hasting***, 461 U.S. 499 (1983).

The only cases in which this Court has refused to recognize a harmless error analysis deal with errors involving, "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error...", ***Chapman v. California***, 386 U.S. at 23, or those errors which, due to their nature, the Court cannot ascertain beyond a reasonable doubt did not contribute to the verdict. ***Chapman v. California, supra***. These types of error include the State's total denial of a criminal defendant's Fifth Amendment right to counsel; ***Gideon v. Wainwright***, 372 U.S. 335 (1963); or the State's coercion of a confession; ***Payne v. Arkansas***, 356 U.S. 560 (1958), or the State's systematic exclusion of blacks from a grand jury. ***Vasquez v. Hillery***, 474 U.S. __, 106 S.Ct. 617, 88 L.E.2d 598 (1986).

In ***Vasquez***, for example, this Court, in rejecting a harmless error analysis, noted that systematic exclusion of blacks from the grand

jury undermined the structural integrity of the criminal tribunal itself, since the grand jury chose whether to return a true bill or not, the degree of the offense to charge, and whether or not to return single or multiple indictments against a particular defendant. Additionally, the very nature of the grand jury process rendered impossible any attempt by the appellate court to determine the violation's effect on the jury verdict.

Thus, the Court will not apply the harmless error analysis where the case involves a violation of a basic, substantial constitutional right. Similarly, the Court will not apply the harmless error doctrine if the record provides no factual basis for a harmless error analysis. However, the Court will apply the harmless error analysis where the alleged constitutional violation concerns other than basic rights and the effect of the alleged constitutional error appears in the record. As the majority of this Court recently re-emphasized in ***Rose v. Clark, supra***:

> ...While there are some errors to which ***Chapman*** does not apply, they are the exception and not the rule....Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.

The matter before this Court plainly falls within those cases in which this Court consistently has applied the harmless constitutional error standard. Certainly the fact that this case is a capital one does not preclude the use of a harmless error analysis since this Court has employed the harmless error doctrine in various contexts in capital

cases as well as non capital cases. ***Zant v. Stephens***, 462 U.S. 862 (1983); ***Hooper v. Evans***, 456 U.S. 605 (1982). The issue of applicability of the harmless error doctrine, then, revolves around the type of constitutional error asserted as opposed to whether or not the case is a capital one.

The particular facts of this case involve the erroneous grant of a State's ***Witherspoon*** challenge for cause when the defendant retained peremptory challenges and, earlier in the selection process, the trial judge improperly denied ***Witherspoon*** challenges and forced the State to expend peremptory challenges to remove the plainly unqualified jurors. While this case raises the issue of the erroneous ***Witherspoon*** exclusion of a juror, the case does not involve the wholesale exclusion of the entire class of persons opposed to or expressing reservations concerning the death penalty. Thus, although raising a ***Witherspoon*** issue, this case stands apart from the constitutionally infirm practice condemned by this Court in ***Witherspoon v. Illinois*** 391 U.S.510 (1968). Furthermore, this case presents the Court with no wholesale exclusion of a distinctive group from the venire, grand jury, or from the petit jury itself, condemned in ***Batson v. Kentucky***, 476 U.S. ___,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See also ***Lockhart v. McCree***, 476 U.S.___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) and ***Vasquez v. Hillery***, 474 U.S.___, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). In fact, as Justice Rehnquist noted in ***Lockhart v. McCree, supra, Witherspoon*** excludables do not constitute a distinctive group for fair cross section purposes. The facts herein contain no suggestion that the jury, as constituted, failed conscientiously to apply the law and find the facts as required by the Sixth amendment fair and impartial jury guarantee. See ***Lockhart v. McCree, supra***. The alleged

constitutional error, then, in no manner affected the defendant's substantial rights since there is no showing that the jury which did try the defendant was other than an impartial adjudicator. Thus, under these facts, the alleged constitutional error in no manner undermines the structural integrity of the criminal tribunal itself, nor does the asserted error strike at the fundamental nature of the jury's sentencing determination. Application of the harmless constitutional error analysis clearly is warranted under such circumstances. ***Chapman v. California***, 386 U.S. 18 (1967).

The facts necessary to a reviewing court's determination whether or not the constitutional error contributed to the jury's sentencing decision plainly appear in the record. Capital case records on appeal almost invariably contain, or may be amended to contain, the record of the jury selection proceedings, including the voir dire questioning and the arguments of counsel concerning ***Witherspoon*** challenges and exclusions. The record, too, plainly reveals the number of peremptory challenges remaining to the defendant and the State. Thus, a reviewing court may readily ascertain whether, under the facts of a particular case, the defendant suffered actual prejudice or the court's error, if any, is harmless in the particular context.

CONCLUSION

The appellate courts must carefully scrutinize capital sentencing cases for circumstances which create an unacceptable risk that the jurors mistakenly or arbitrarily imposed a death sentence. In the course of this scrutiny, however, the courts must avoid standing as impregnable citadels of technicality and recognize that fallible human beings conduct criminal trials. A perfect trial occurs only in fiction.

Where constitutional error affects no right basic to a fair trial, and the record provides an adequate basis in fact for a determination that the constitutional error appears harmless beyond a reasonable doubt, the appellate courts should accept the human fallibilities inherent in our system of laws administered by humans and utilize the doctrine of harmless error. Where a trial court erroneously grants a State's ***Witherspoon*** challenge for cause, the error should be harmless indeed if the defendant failed to exhaust his peremptory challenges at the conclusion of the jury selection, and particularly so where the State earlier suffered the erroneous denial of a ***Witherspoon*** challenge and peremptorily removed the unqualified juror.

WHEREFORE, the States respectfully urge this Court to apply the harmless error analysis to ***Witherspoon*** exclusions and affirm the judgment of the Mississippi Supreme Court.

Respectfully submitted,

Lacy H. Thornburg
Attorney General

Joan H. Byers
Special Deputy Attorney General

David Roy Blackwell
Assistant Attorney General
Counsel of Record
P. O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-6012